Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

GEORGE C. W. GOODMAN,

Petitioner,

v.

BOWDOIN COLLEGE

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 15, 2004

QUESTION PRESENTED

1. For the purposes of 42 U.S.C. §§ 1981 and 2000d, was it proper for the Court below to rule that, at the close of the plaintiff's case at trial, defendant was entitled to judgment as a matter of law based entirely on its proffered, non-discriminatory explanation of its treatment of plaintiff and on the Court's finding that the plaintiff did not offer evidence directly refuting that explanation, where plaintiff had presented sufficient direct and circumstantial evidence which, taken as a whole, would permit a reasonable juror to infer that race or national original was a substantial or motivating factor in the treatment of the plaintiff?

PARTIES TO THE PROCEEDINGS

Petitioner George C. W. Goodman was the plaintiff/ appellant in the Court of Appeals.

Respondent Bowdoin College was a defendant/appellee in the Court of Appeals.

Robert H. Edwards, Craig W. Bradley, Mya Mangawang, Robert Graves, and Karen Tilbor were defendants/appellees in the court of appeals, but not with respect to the civil rights claims at issue in this petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The First Circuit's Decision Misapplied *McDonnell Douglas* In A Way That Raises the Bar for Reaching a Jury 9

II. The First Circuit's Failure to Recognize the Sufficiency of Petitioner's Evidence Also Is In Conflict With This Court's Holding In *Price Waterhouse* 16

CONCLUSION 18

APPENDIX A

First Circuit Opinion, dated August 17, 2004 ..... 1a

APPENDIX B

Transcript of District Court's Oral Ruling Granting Defendants' Motion for Judgment as a Matter of Law on Plaintiff's Civil Rights Claims, February 21, 2002 ..... 27a

APPENDIX C

Transcript of District Court's Oral Ruling that the College's Diversity Policy Could be Relied on as Evidence of Discrimination in a Disciplinary Proceeding, February 22, 2002 ..... 31a

TABLE OF AUTHORITIES

CASES:

Educadores Puertorriqueños en Acción v. *Hernández*, 367 F.3d 61 (1st Cir. 2004) 17

Fernandes v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999), abrogated in part on other grounds, *Desert Palace, Inc. v. Costa*, 530 U.S. 90 (2003) 9, 13

Goodman v. *Bowdoin College*, 380 F.3d 33 (1st Cir. 2004) 1

Goodman v. *President & Trs. of Bowdoin* College, 135 Supp. 2d 40 (D. Me. 2001) 17

Grutter v. *Bollinger*, 539 U.S. 306 (2003) 15

Leatherman v. *Tarrant County Narcotics* Intelligence *Coordination Unit*, 507 U.S. 163 (1993) 17

McDonald v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) 10

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 7, 9-10, 18

Ostrowski v. *Atlantic Mut. Ins. Companies*, 968 F.2d 171 (2nd Cir. 1992) 16

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 7, 17-18

Rathbun v. *Autozone, Inc.*, 361 F.3d 62 (1st Cir. 2004) 9, 11-12

Reeves v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 130 (2000) 7, 10, 12, 17

Swierkiewicz v. *Sorema N.A.*, 534 U.S. 506 (2002) 17

Taylor v. *Virginia Union Univ.*, 193 F.3d 219 (4th Cir. 1999), cert den. 528 U.S. 1189 (2000)..... 16

Texas Dep't. of Community Affairs v. *Burdine*, 450 U.S. 248 (1980)..... 9, 12

Thomas v. *Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999), cert. den. 528 U.S. 1161 (2000)..... 13

Tolbert v. *Queens Coll.*, 242 F.3d 58 (2d Cir. 2001)..... 10

United States Postal Service Bd. of Governors v. *Aikens*, 460 U.S. 711 (1983) 17

STATUTES:

42 U.S.C. §1981..... 1, 10

42 U.S.C. §2000d..... 1, 10

28 U.S.C. §1254(1)..... 1

OTHER AUTHORITY

Leonidas, Ralph Mecham, 2003 *Annual Report of the Director for the Judicial Business of the United States Courts*, at Tables B-7 and C-2 (http.//www/uscourtsgov/judgbususc/judbus.html) 15

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 380 F.3d 33 (1st Cir. 2004), and reprinted in Appendix ("App.") A, at App. 1a-26a. The ruling of the District Court granting judgment as a matter of law to the College on the civil rights claims is in Appendix B, at App. 27a-30a, and the District Court ruling that the College's diversity policy could be used as a basis for arguing that there was discrimination in a disciplinary proceeding is in Appendix C at App. 31a.

JURISDICTION

The judgment of the Court of Appeal sought to be reviewed was entered on August 17, 2004. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutes construed are two. Title 42 U.S.C. §§1981 and 2000d, state respectively, in pertinent parts, that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> [n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Petitioner Goodman, a Caucasian American, was dismissed from Bowdoin College ("Bowdoin") in the Spring of 1999 after Bowdoin's student judicial board (the "J-Board") found him entirely at fault for a brief fight with an Asian student from Korea. The Korean student was completely exonerated. The incident arose when Goodman threw a snowball at a college shuttle-van driven by the Korean student, Namsoo Lee. As the opinion below describes petitioner's facts, the Korean student reacted by chasing after a "retreating Goodman." (App. 1a.) Lee first chased petitioner Goodman in the van, "threatening to run Goodman over with the van and backing the van onto the sidewalk" (App. 2a.) and ending up "just three to four feet from the trees" where Goodman had retreated. (App. 13a.) Lee then got out of the van "in violation of college rules" and "pursu[ed] Goodman on foot as he was walking away and telling Lee that he did not want to fight." (App. 17a.) A fight ensued. "Lee admitted making the first physical contact with Goodman." (*Id.*) Lee ended up with a broken nose. Later that night, and in the presence of a Bowdoin security officer, Lee "acknowledged to the police that he was at fault." (*Id.*)

A hearing was held by the Bowdoin J-Board during which Lee was allowed to repeatedly use race to defend himself, and the Dean assigned to assist him in front of the all-student J-Board was aggressive (acting "with zeal" App.17a) in his defense, while the Dean assigned to petitioner Goodman sat mute during the short time she was even present. Only Goodman was punished. He was dismissed.

Goodman commenced this action in the district court against Bowdoin, alleging that Bowdoin had discriminated against him by favoring the Korean student on account of his

race despite the evidence that Lee had been the aggressor.[1] After pre-trial motions and discovery had been completed, the case was tried to a jury.

At the close of petitioner Goodman's case at trial, the district court granted Bowdoin's motion for judgment as a matter of law on Goodman's civil rights claims on the ground that "no jury could find a reasonable basis in this record to conclude that the dismissal or any of the events that led to the dismissal were motivated in any way by racial considerations." (App. 30a.)

The First Circuit affirmed on the same basis. However, in doing so it found that all of the following evidence had been presented by petitioner at the trial:

> Lee acknowledged to the police that he was at fault; the J-Board questioned Lee several times about his admission of fault; Lee admitted to backing the van up and pursuing Goodman on foot as he was walking away and telling Lee that he did not want to fight; Lee left the shuttle in violation of college rules; Lee admitted making the first physical contact with Goodman; the police determined the fight to be "mutual combat;" Lee is an Asian student from Korea; Foster [a Bowdoin Dean who was Lee's advisor] discussed with Lee the option of seeking relief from the Maine Human Rights Commission; no

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[1] Petitioner also alleged that Bowdoin breached its contractual obligation (found in its student Handbook) to conduct an "impartial proceeding" and to abide by certain procedural safeguards delineated in the Handbook. The jury found against petitioner on that claim. Goodman also brought a negligence claim. On a special verdict on that claim, the jury found that Lee had been negligent in his conduct but that no damages had been proximately caused by his negligence.

> member of the J-Board asked Lee why he wondered if Goodman's throwing of a snowball might be a racist act; Graves [the Dean assigned to act as "complainant" on behalf of Korean student Lee] questioned Goodman and Olbres [an uninvolved, student eyewitness who supported Goodman's version of events] with zeal; Tilbor [the Dean assigned to act as complainant on behalf of white student Goodman] was not present for most of the consolidated hearings and did not make any closing argument or question the witnesses; Mangawang [the Bowdoin Dean who was J-Board advisor] removed a board member from the J-Board panel because she knew he was friends with Goodman's eyewitness [Olbres]; Mangawang did not remove Hustedt [the chair of the J-Board], who in a proceeding two years earlier had signed a letter questioning the truth of testimony Goodman had provided; Goodman was dismissed for two years; Goodman's punishment was the harshest ever for a fight; and Lee was fully exonerated. We accept these facts as true for the purposes of evaluating Goodman's claims of racial discrimination.

(App. 17a.)

The Court below also mentioned another piece of evidence, noting that on the contract claim alleging the failure of the J-Board to act impartially as promised in the student Handbook (see note 1, supra) "the district court allowed the jury to consider Bowdoin's cultural diversity policy" as it might create an inference of unfair treatment on account of the Korean student's preferred status under that policy and thus could be "'alleged to be a predicate for discrimination in a

disciplinary proceeding.'" (App. 20a, n.21) (Citation omitted). (The district court ruling itself is at App. 31a.)

The Court also detailed the discrimination evidence it summarized in the above quotes. For example, the Court noted that in his meetings with Lee prior to the hearing, Dean Foster, Lee's advisor, introduced the subject of race. "He told Lee that he could pursue criminal charges with the local police and that if the incident had 'racial components' to it, Lee could seek the assistance of the Maine Human Rights Commission." (App. 14a.) Foster also testified that Lee's father had told him that he was "concerned that if Lee took any action outside the college proceedings, Lee could encounter problems with his student visa and be deported." (*Id.*) This would have meant that Lee would lose the benefit of his U.S. education.

With respect to Lee's use of race-based explanations for his behavior, the Court quoted some of Lee's comments at the J-Board hearing:

> He [Lee] also said that he was a citizen of the Republic of Korea. In answer to a question about why he got out of the shuttle [to pursue the retreating Goodman], he said he wanted to know why Goodman had thrown the snowballs:
>
> > I thought he had a personal feeling against me, even though I didn't know him. I even thought about, um, oh, he's being racist or something like that . . . .
>
> Lee repeated this sentiment two other times during the hearings. Twice he expressed surprise that Goodman had not been arrested after the

> incident, saying "[i]n Korea, Mr. Goodman would have been arrested right away . . . ."

(App. 6a-7a.)

So frequently did Lee use his race and charge Goodman with "being a racist," that, in the end, as the Court noted, Goodman had to defend himself against being a racist by telling the J-Board that:

> I know [Lee] said that maybe I was being racist towards him. That is completely false. I've lived in Vietnam, I've traveled in Japan, I've been in China, Indonesia. I mean, my father used to teach at Georgetown in Foreign Affairs and specialized in East Asian Studies. And, I mean, I have more respect and enjoyment out of that culture than I can explain. Racist comments coming out of him thinking I am racist in any way is completely just wrong.

(App. 9a.)

During the entire hearing, "no member of the J-Board" (App. 17a.) challenged or disavowed Lee's interjection of race and national origin into a hearing about an incident that had nothing to do with race whatsoever. No one asked or questioned why, in Korea, the police would summarily arrest Goodman after Lee had told them he was at fault. The J-Board, and the involved Deans, simply allowed him to repeatedly make baseless allegations of Goodman being racist and to use other race-based excuses. After the hearing, at the beginning of the J-Board's private deliberations, a member of the J-Board stated "this isn't about race." The district court found this to be an "ambiguous" statement of the type that, if combined with "direct evidence, or strong corroborating

evidence" of discrimination, can permit an inference of "racial animus." (App. 29a-30a)

Finally, with respect to the threshold issue of "responsibility" (the J-Board term for "fault"), the J-Board had issued written findings immediately after the hearing in which it stated that the specific reason that it had found Goodman "responsible" was because of "'inconsistencies in [Goodman's] story that, specifically, did not match [Connor's] account (van placement is key here) we found particularly alarming.'" (App. 9a.) Goodman had presented several witnesses at trial, however, whose testimony refuted Conner's van placement account (App. 12a-14a.), which evidence, he contended, showed that Conner's report was a pretext (App. 19a) to protect Lee, instead of Goodman (or both of them), from being found at fault.

Relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and their progeny, petitioner contended below that he had presented sufficient evidence from which a juror could conclude that race and national origin had been a substantial or motivating factor in the J-Board hearing and decision against him.

Yet, after reciting all the above evidence, the First Circuit brushed it aside. First, it cited the holding in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) that once "a plaintiff establishes a prima facie case of discrimination, the employer must articulate a legitimate, nondiscriminatory basis for its conduct." (App. 18a, n.17.) Second, it asserted that, "without expressly citing" it, petitioner had relied on "the familiar *McDonnell Douglas* paradigm." (App. 18a.) Third, using the "*McDonnell Douglas* paradigm" (*id.*), it noted that Bowdoin had indeed offered a non-discriminatory explanation for having dismissed Goodman and having

exonerated Lee, and then held that this explanation *alone* allowed judgment as a matter of law without the need for the jury to weigh that explanation against all the evidence of discrimination and pretext which the Court itself (see above) had recited:

> Assuming, *arguendo*, both the applicability of the *McDonnell Douglas* framework and that Goodman has presented a prima facie case of discrimination, we turn our attention to the issue of pretext . . . .
>
> Goodman's analysis fails to grapple with the most fundamental explanation for his dismissal proffered by Bowdoin, namely that he injured another student severely. The J-Board's recommendation of dismissal was not premised on a finding that Goodman lied about Lee backing the shuttle van toward him; it rested on findings that Goodman had given Lee a severe beating, that Goodman had not taken responsibility for the beating, and that Goodman had committed a prior offense. * * * Goodman fails to address this non-discriminatory explanation . . . much less demonstrate that it was false and the true reason for his dismissal was discriminatory.

(App. 19a-20a.) (Footnote omitted.)

The First Circuit simply accepted that explanation as dispositive. Taking a "similar approach" with respect to Lee's use of race at the J-Board hearing, the First Circuit stated that it had "reviewed with care" the "record in Goodman's disciplinary proceeding" and had concluded that "the J-Board considered a wealth of conflicting evidence

regarding the conduct of Lee and Goodman on the night of the incident, and concluded that Lee had been injured and had not thrown a punch," thus, once again, simply accepting the College's explanation as dispositive. (App. 20a.) It thus affirmed the district court's decision to take the civil rights claims away from the jury.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Decision Misapplied *McDonnell Douglas* In A Way That Raises the Bar for Reaching a Jury

The Circuit Court's decision misapplies *McDonnell Douglas*, 411 U.S. 792, *supra.* That case does not hold, as the Circuit decision states, that a defendant's explanation for its harsh treatment of the plaintiff must be accepted as true where there is other evidence from which a reasonable juror could conclude that the real reason was on account of race and national origin. *McDonnell Douglas* was simply this Court's pronouncement to settle the question involving the burden of going forward with any innocent explanation available to the civil rights defendant, after the civil rights plaintiff had made a threshold showing of potential discrimination. That threshold showing, which will "vary according to the nature of [the plaintiff's] claim," has been repeatedly held to be "modest." *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 71 (1st Cir. 2004)[2]

For example, in an age discrimination wrongful discharge case, it involves showing only that plaintiff was a member of

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[2] See, also, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("[t]he burden of establishing a prima facie case of disparate treatment is not onerous"), and *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999), abrogated in part on other grounds, *Desert Palace, Inc. v. Costa*, 530 U.S. 90 (2003).

the protected class, was otherwise qualified for the position from which he or she was fired, and a person younger than the protected age was hired to fill his or her position. *Reeves*, 530 U.S. at 142. Here, as the facts recited in the Circuit Court's opinion show, plaintiff clearly made such a prima facie case: he is a Caucasian American, he was a student in good standing at Bowdoin, he was involved in an incident in which a Korean student was the admitted aggressor and which the police determined on the night of the incident (after hearing only the Korean's student's side of the story) that it was "mutual combat," and, yet, after a hearing was held by Bowdoin College, the Korean student was exonerated and he received the "harshest ever" punishment for an incident of its sort.[3]

Once this "modest" showing has been made, there is a rebuttable presumption that discrimination was involved, and the burden shifts to the defendant to put forward an explanation for the decision. If it does, then the presumption disappears. Nothing in *McDonnell Douglas*, or its progeny, however, suggests a court can, as the First Circuit did here, itself seize on the explanation provided by the employer and, ignoring all the evidence from which a jury could infer discrimination, grant judgment to the defendant on the basis of that explanation.

All the circuits, until this panel decision, have seen *McDonnell Douglas* as simply stating a burden-allocating

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[3] This Court has previously held that the protections of 42 U.S.C. § 1981 are available to white persons as well as traditionally protected minorities, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), and that claims brought under § 1981 are analyzed under the same analytical frameworks as Title VII cases. *See Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989).* The same is true for cases brought under 42 U.S.C. § 2000d. *See, e.g., Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001).

methodology. For example, *Rathbun,* 361 F.3d at 71-72 states that:

> The elements of the plaintiff's prima facie case vary according to the nature of her claim. In a failure-to-promote claim, for example, those elements are that the plaintiff (i) is a member of a protected class who (ii) was qualified for an open position for which she applied, but (iii) was rejected (iv) in favor of someone possessing similar qualifications.
>
> That modest showing suffices to raise an inference of intentional discrimination. The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision(s). "So long as the employer proffers such a reason, the inference raised by plaintiff's prima facie case vanishes."
>
> At that juncture, the burden of production reverts to the plaintiff, who then must proffer evidence that she was treated differently on account of her sex. This evidence, viewed in the light most favorable to the plaintiff, must be sufficient "to prove . . . that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." To this end, "many veins of circumstantial evidence ... may be mined." These include--but are by no means limited to--evidence of differential treatment, evidence of discriminatory comments, statistical evidence, and comparative evidence.

(Citations omitted).

Rathbun, as did so many other cases before this Circuit decision below, restated the important limitation that the innocent explanation proffered by the defendant only removes the presumption and re-shifts the burden to the plaintiff. That explanation does not operate as the defendant's refuge from a jury:

> Satisfying this third-stage burden does not necessarily require independent evidence of discriminatory animus. In a proper case, the trier may infer the ultimate fact of discrimination from components of the plaintiff's prima facie showing combined with compelling proof of the pretextual nature of the employer's explanation.

Id. at 72. This important limitation, which the Circuit decision below obliterates, derives from this Court's decision in *Reeves*, 530 U.S. at 148, which held that:

> . . . a plaintiff's prima facie case [of discrimination], combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

As this Court stated in *Burdine*, 450 U.S. at 256:

> This [third stage] burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly

> by showing that the employer's proffered explanation is not worthy of credence.

Petitioner's prima facie case combined with the evidence he presented of the acquiescence in Lee's use of race, the "ambiguous" (as found by the district court) J-Board statement about race, the college's diversity policy that the district found could be a predicate for discrimination, and the disparate treatment and pretext to protect Lee from being found at fault, collectively, more than satisfied the quantum of evidence routinely recognized as sufficient at this stage to allow an inference that a defendant's explanation is "not worthy of credence." See *Fernandes.*, 199 F.3d at 586, 588, where the Court stated:

> As long as the plaintiff offers evidence of pretext, the trial court must not accept the employer's proffered reason . . . no matter how plausible it may sound. * * * [g]iven the contradictions and ambiguities that permeate this record, the question of whether DaCosta's stated preference for hiring 'my own men' is a pretext for racial discrimination is for the *factfinder* at trial not for the judge on a Rule 56 motion. (emphasis added).

See also, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999), holding that pretext is not always a question of a true vs. false reason, but a plaintiff may challenge:

> the racial neutrality of the proffered reason itself . . . if an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the

> disfavored employees have been subjected to "discriminate[ion] . . . because of . . . race."

In reversing the grant of the defendant's motion for judgment as a matter of law, *Reeves* went on to hold that:

> [T]he court disregarded critical evidence favorable to petitioner – namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. . . In concluding that . . . no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

530 U.S. at 152-153. The Circuit decision thus clearly went way beyond the permissible use of defendant's explanation (to remove a presumption) and shift the burden of proof back to the plaintiff. Rather, it used that explanation as the beginning and the end of the story. In so doing, it disregarded the above-quoted command of this Court because it "impermissibly substituted its judgment concerning the weight of the evidence for the jury's."

The First Circuit decision sets back the civil rights proof requirements which have been established over many decades. It provides an easy (and unacceptable) out for the defendants. Any time it is said that the explanation itself cannot be rebutted by direct evidence of its falsity, the plaintiff loses (does not even get to a jury) despite whatever other evidence plaintiff has produced that race, national origin, gender, or age was the real reason for the defendant's actions.

This simply should not be allowed to stand. Civil rights cases are unquestionably important. Moreover, the problem created by the First Circuit decision is also likely to have a wide impact. The most recent publicly-maintained figures reveal that employment and other civil rights claims constitute, respectively, the second and third largest types of federal question claims commenced in U.S. district courts.[4]

Finally, the context from which this case arose, the College campus, heightens its importance. This Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), recognizes the value of diversified student bodies in all the major colleges and universities. This case presents an opportunity to make clear that the civil rights protections are fully available to all students once they reach those campuses and that, if any student has a claim that he or she was treated differently on account of race or national origin, the standard of proof will be the same, regardless of race or national origin.

Certainly, a full review of this Court is warranted before the Circuit decision is allowed to become part of the mix by which other cases are decided.

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[4] In fiscal 2003, there were a total of 38,989 employment and other civil rights cases (excluding voting rights, housing and accommodation and welfare civil rights cases) commenced in the district courts, of which 35,049 involved private, federal question cases. These cases represented almost 25% of all federal question cases filed in the district courts. At the circuit level, there were a total of 5,843 appeals filed in private, federal question civil rights cases in fiscal 2003, representing 17 percent of all civil appeals filed. Leonidas Ralph Mecham, *2003 Annual Report of the Director for the Judicial Business of the United States Courts*, at Tables B-7 and C-2 (http.//www.uscourts.gov/judbususc/judbus.html).

II. The First Circuit's Failure to Recognize the Sufficiency of Petitioner's Evidence Also Is In Conflict With This Court's Holding In *Price Waterhouse*

By first reciting in detail and then rejecting as insufficient all the evidence introduced by petitioner at trial, the First Circuit decision also is at odds with *Price Waterhouse*, *supra*. *Price Waterhouse* holds that notwithstanding a defendant's proffered nondiscriminatory reasons, a plaintiff's claim of discrimination is entitled to jury consideration if the plaintiff "produce[s] evidence *sufficient* to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder *could draw an inference* that the decision was made 'because of' the plaintiff's protected status." 490 U.S. at 278 (O'Connor, J., concurring) (emphasis added). This evidence includes *conduct or actions* as well as statements of the alleged discriminator. See, e.g., *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (discriminatory animus may be shown by "'evidence of *conduct* or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision'") (emphasis added), and *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2nd Cir. 1992) (discriminatory animus may be established by "evidence of *conduct* or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude, . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision") (emphasis added).

Indeed, as in petitioner's case, the evidence in *Price Waterhouse* itself was based largely on the conduct of Price Waterhouse in its decisionmaking process -- specifically, its conduct in failing to disavow the stereotypical comments

made about Hopkins was found to be sufficient to infer that the decision-makers placed substantial negative reliance on her gender. Likewise, Bowdoin's holding of a one-sided hearing in which objective evidence of Lee's fault was ignored or covered up, protecting him against discipline, and during which the College allowed Lee's false, race-based allegations to be made against Goodman, in a diversity-conscious college environment (as found by the district court), where being identified as a racist is as negative for one's cause, and creates just the same vulnerability, as it was for a female employee to be identified as a "'women's lib[b]er'" (490 U.S. at 236) in the male-dominated Price Waterhouse environment, was conduct that directly reflected a discriminatory attitude and bore directly on the decision-making process.

Finally, recognizing the sufficiency of such evidence is in keeping with this Court's decisions emphasizing that courts should not be looking for ways to prevent civil rights claims from being heard by imposing special pleading or proof requirements. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (striking down special pleading requirements)[5] and *Reeves*, 530 U.S. 133 (holding that a plaintiff did not have to have independent evidence of discrimination in addition to a prima facie case of discrimination and evidence sufficient to show that defendant's alleged nondiscriminatory reasons were a pretext). As this court stated in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983):

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[5] Indeed, petitioner's was the first decision in the First Circuit in which the district court, relying on this court's holding in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), held that a heightened pleading standard did not apply. See *Goodman v. President & Trs. of Bowdoin Coll.*, 135 F. Supp. 2d 40 (D. Me. 2001). That result was affirmed in *Swierkiewicz*, and later followed by the First Circuit in *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61 (1st Cir. 2004).

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. *But none of this means that trial courts or reviewing courts should treat discrimination differently from other questions of ultimate fact.* Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof" in deciding this ultimate question. The law often obliges finders of fact to inquire into a person's state of mind.

(Citation omitted and emphasis added.)

The reality is that, in many cases, like petitioner's, a plaintiff will have evidence that may meet both the *McDonnell Douglas* pretext and the *Price Waterhouse* mixed motive standard, and a court therefore should instruct a jury on both standards. In failing to recognize the sufficiency of petitioner's evidence the First Circuit's decision conflicts with both of these precedents and their progeny.

CONCLUSION

The First Circuit's decision directly conflicts with important precedents of this Court, and involves important

questions on which there is a need for clear Supreme Court guidance. Therefore, review by this Court is warranted.

Respectfully submitted,

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